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4

5   UNITED STATES DISTRICT COURT

6   NORTHERN DISTRICT OF CALIFORNIA

7   SAN JOSE DIVISION

8 COUPONS, INC., a California corporation,)   Case No. 5:07-CV-03457 HRL
)
9   Plaintiff,   )   **DEFENDANT'S REPLY TO**
)   **PLAINTIFF'S OPPOSITION TO**
10   v.   )   **DEFENDANT'S MOTION TO**
)   **SUMMARILY ENFORCE SETTLEMENT**
11 JOHN STOTTLEMIRE   )   **AGREEMENT**
)
12   Defendant   )   Date: February 24, 2009
)   Time: 10:00 AM
13   )   Courtroom: 2, 5th Floor
)   Judge: Hon. Howard R. Lloyd
14   )
)
15

16   Pursuant to Civil Local Rule 7-3(c), Defendant John Stottlemire ("Stottlemire") submits

17 this reply to Plaintiff Coupons, Inc.'s ("CI") Opposition to Defendant's Motion to Summarily

18 Enforce Settlement Agreement ("Opposition").

19

20 Dated: February 10, 2009   /s/
                                              John Stottlemire
21   Defendant, *pro se*

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Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Summarily Enforce Settlement Agreement
No. 5:07-CV-03457 HRL   i

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I. **INTRODUCTION**

First and foremost, CI cannot refuse to fulfill its contractual obligations to Stottlemire by claiming it has rescinded an agreement which precludes rescission. Using irrelevant argument and baseless speculation, CI attempts to do just that. For these reasons, as discussed in further detail below, the Court should reject CI's arguments, and order the Settlement Agreement to be enforced. The case should be dismissed with prejudice.

II. **QUESTIONS PRESENTED BY THE COURT, WITH STOTTLEMIRE'S ANSWERS**

1. Does California law control enforceability of a settlement agreement?

   Answer: Yes.

2. Is a stipulation to dismiss a material term of settlement or a consequence of settlement?

   Answer: A consequence of settlement.

3. Would the Court allow a stipulation to dismiss to be filed under seal?

   Answer: No.

4. Was sealing the stipulation negotiated?

   Answer: No.

5. Was the purported breach material?

   Answer: No. There was no breach since the parties altered the agreement to publicly disclose the lawsuit would be dismissed with prejudice. If there was a breach, it cannot be defined as material.

6. Can CI quantify damages caused by Stottlemire?

   Answer: No.

7. If disparagement was an issue, why wasn't it a term of the agreement?

   Answer: CI knew that Stottlemire was blogging about his experiences with the lawsuit, but included no term restricting Stottlemire from blogging further. If CI, a sophisticated party represented by experienced counsel, thought disparagement was an

1   issue, it could have included it as a term of the Settlement. CI did not. Because CI did

2   not negotiate disparagement, it was not a term of the Settlement.

3

4   8. Could Stottlemire say he "kicked ass" before learning that "CI is fine with making the

5   terms public"?

6   Answer: Yes. Stottlemire's statement was not restricted by the Settlement.

7

8   **III.   ARGUMENT**

9   **1. The Mutual Release is Enforceable**

10   CI and Stottlemire entered into an enforceable Settlement Agreement ("Settlement") on

11   November 13, 2008. Contrary to CI's arguments, the Settlement remains enforceable.

12   Just one of the terms of the Settlement was an exchange of mutual general releases in

13   standard form. The fact that CI has never signed the Mutual Release of Claims ("Release") is of

14   no consequence. Alipo v. Secretary of the U.S. Army, 1998 U.S. Dist. LEXIS 6360 (N.D. Cal.

15   1998). The moment that CI and Stottlemire signed the Settlement, the minds met and CI and

16   Stottlemire agreed to the terms of the Release. CI must now fulfill its contractual obligations as

17   agreed to in the Release.

18   CI and Stottlemire agreed to exchange mutual releases in standard form, and CI knew what

19   was in the standard form. For CI to claim they did not agree to the language in the Release is

20   contradicted by CI's own Opposition, as a review of the facts shows.

21   First, CI admits it understood completely on November 13, 2008 the terms to which it was

22   agreeing to when it signed the Settlement. CI states, the language common in releases is that the

23   parties "each further represent, warrant and agree that the Settlement Agreement shall remain in

24   full force, and in effect, notwithstanding the occurrence of any possible changes or differences in

25   material fact" (Opposition 23:9-12). CI cannot claim it did not agree to this term on November 13,

26   2008 when it signed the Settlement. CI admits that it was standard language for "general releases

27   in standard form". CI's signature on the Settlement equates to a signature to all terms which are

28   standard in a general mutual release of claims.

1   Second, CI crafted the language of the Release and told Stottlemire that as soon as he

2   signed it, it would file the Stipulation for Dismissal with Prejudice. CI sent the Release to

3   Stottlemire with an attached promise, "When we receive your signature, we'll file the Stipulation

4   for Dismissal" (Declaration of John Stottlemire in Support of Defendant's Motion to Summarily

5   Enforce Settlement ¶ 7). CI's attached promise unequivocally admits that CI agreed to each term

6   of the Release.

7   Third, discussions between CI and Stottlemire after the purported breach also make clear

8   CI's agreement to the terms of the Release. CI explained in detail the term in the Release which

9   requires that the Settlement remain in full force and effect, regardless of what happens in the future

10 (Motion 6:18-27, 7:1-2). CI cannot backpedal now. It is unconscionable for CI to expect this

11 Court to believe that CI did not agree to terms of the Release when CI interpreted their meaning

12 and used them to support its belief that Stottlemire breached the Agreement.

13   Fourth, the parties did not agree to keep confidential anything other than the terms of the

14 Settlement. CI knew that Stottlemire was blogging about the lawsuit. A sophisticated party

15 represented by experienced counsel, CI could have included disparagement terms in the

16 Settlement. CI did not include any additional terms. Thus, Stottlemire had the right to discuss

17 anything other than the terms of the Agreement.

18   Lastly, much of Stottlemire's Motion offers arguments and authorities which establish the

19 existence of terms to a contract even when one party refuses to sign the agreement. All of

20 Stottlemire's arguments go unopposed by CI. This Court should accept them. CI and Stottlemire

21 have entered into a binding contract. There can be no disputed material facts concerning the

22 existence or terms of the Release. CI decided what the standard form of a mutual release should

23 be, crafted the language, promised to execute the terms of settlement after Stottlemire signed and

24 returned the Release and then attempted to use the Release to its own advantage.   The terms of

25 that Release must now be carried out and CI must be bound to its contractual obligations.

26   **2. CI Foreclosed its Right to Rescission**

27   By adding terms to the Release which preclude rescission and agreeing to those terms, CI

28 foreclosed rescission. By foreclosing rescission, CI must release Stottlemire of all claims. This

1   Court should require CI to file the Stipulation to Dismiss with Prejudice and release Stottlemire of

2   all claims.

3   On November 23, 2008, CI fully explained its understanding of the Release (Motion 10-

4   11). Stottlemire did not oppose CI's explanation. By their actions, CI and Stottlemire have agreed

5   to settle on the terms that were specified. As discussed above, whether or not the parties can

6   control changes or differences in material fact, the Settlement is binding.   Upset about the "ass-

7   kicking" comment, CI seeks to undo the Settlement, using arguments that are diametrically

8   opposed to its understanding of the Release, as conveyed to Stottlemire in its November 23, 2008

9   communication. During discussion with CI soon after the purported breach, Stottlemire stated:

10   "Dennis [Cusack] promised to file the stipulation to dismiss with prejudice as soon
          as he had my signature on the accompanying document. I gave my signature on the
11   document on November 19, 2008. There has been no request nor any stipulations
          provided that the stipulation be filed under seal. The stipulation would have
12   become a public document for any person who has access to the PACER system,
          the Court docket or any websites which display the Court docket (i.e. justia).
13
          "While both parties have agreed that the terms of the settlement would remain
14   confidential, that confidentiality obviously does not extend to a document which
          would be filed publicly by your office. You [(Neil Goteiner)] and Dennis [Cusack]
15   drafted the stipulation and you were going to file it publicly. If you have forgotten
          what the stipulations say, go read it. Since I have signed the stipulation with full
16   knowledge that the stipulation would be filed as soon as you have my signature on
          the [Mutual Release] and the stipulation holds no provisions to be kept under seal or
17   redacted in any form, both sides have agreed to a revision on that particular term."
          (Declaration of John Stottlemire in Support of Defendant's Motion to Summarily
18   Enforce Settlement Exhibit H, Page 2).

19   As a sophisticated party represented by experienced counsel, CI could have included a term

20   to file the stipulation under seal, but did not. Per the Local Rules, a motion to file under seal, and

21   the filing party's response if that motion is denied, is in complete control of the filing party:

22   "If a request to file under seal is denied in part or in full, neither the lodged
          document nor any proposed redacted version will be filed. The Clerk will notify
23   the submitting party, hold the lodged document for three days for the submitting
          party to retrieve it, and thereafter, if it is not retrieved, dispose of it. If the request is
24   denied in full, the submitting party may retain the document and not make it part of
          the record in the case, or, within 3 days, re-submit the document for filing in the
25   public record. If the request is denied in part and granted in part, the party may
          resubmit the document in a manner that conforms to the Court's order and this
26   rule." (Civ. L.R. 79-5(e))

27   Here, if CI felt the confidentiality term extended to the Stipulation to Dismiss with Prejudice, CI

28   could have filed it with a Motion to Seal. Since only the word "with" (from the phrase "with

prejudice") is the only word not yet known by the public, CI's attempts would have been limited to that single word. CI offers no case law where only one word could be redacted. CI also offers no case law in which a Court has permitted a party to seal information that a case was dismissed with prejudice as opposed to being without prejudice. If the Court had denied the Motion to Seal (which in all likelihood, the Court would have, given the requirements of Local Rule 79-5), CI would have been given the opportunity to re-file. CI could have filed the Stipulation to Dismiss with Prejudice after conferring with Stottlemire and altering terms of the Settlement it contends existed. CI had complete control.

With full knowledge of the control it possessed, CI argued the Release provided that the Settlement remained in full force, and in effect regardless of what happens in the future. CI made this analysis on November 23, 2008 (Motion 10:23-28, 11: 1-7) when it suited CI's purpose. Now, CI is backpedaling, and is attempting to renege on its contractual obligations. In opposition to Stottlemire's Motion, CI argues the term of the Release it previously analyzed has binding effect only if the changes or differences in material effect are outside the parties' control (Opposition 23: 9-16). CI cannot claim to have it both ways when it chooses. If CI had meant to limit the binding effect of the Settlement only when changes or differences in material effect were outside of the parties' control, it could have added those words to the Release. Instead, the Release says "notwithstanding the occurrence of *any* possible changes or differences in material fact" (Motion Exhibit D) and CI interpreted this statement to mean "regardless of what happens in the future" (Motion Exhibit H, Page 1). The Release therefore requires, just as CI stated on November 23, 2008, the Settlement remain in full force and effect regardless of what happens in the future. CI foreclosed its right to rescission when it agreed to these terms. CI cannot escape its own practical interpretation of the contract:

> "As stated in Corbin on Contracts, "The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention." (3 Corbin on Contracts (1960) § 558, p. 256, fn. omitted; and see, e.g., Heston v. Farmers Ins. Group (1984) 160 Cal.App.3d 402, 414-415 [206 Cal.Rptr. 585].)" (*Southern*

1 *California Edison Company v. The Superior Court of Los Angeles County*, 37
   Cal.App.4th 839 at 851, (1995)).

2 CI further opposes Stottlemire's Motion and argues the Release does not immunize a party

3 from remedies for a breach or fraudulent inducement (Opposition 23:13-14). Setting aside that

4 there was no fraudulent inducement, CI cannot pretend that its only remedy is rescission of the

5 Settlement nor does Stottlemire's Motion even remotely pretend to rob either party of all of the

6 remedies it may be entitled to if a material breach of the terms actually occur. Stottlemire's

7 Motion argues that rescission of the Settlement is precluded. The parties obviously have other

8 remedies available. Stottlemire is using one remedy – specific performance – to force CI to

9 dismiss the case with prejudice, as CI promised to do.

10 Next, not only is rescission of the Settlement precluded by the Release, both CI and

11 Stottlemire acknowledged "other facts upon which Coupons and Stottlemire may be relying in

12 entering into the Settlement Agreement may later turn out to be other than, or different from, those

13 now known, suspected or believed to be true" (Motion Attachment D, Page 3). CI claims and

14 Stottlemire adamantly denies the facts it relied upon to settle this dispute are other than or different

15 from those now known, suspected or believed to be true. Specifically, that Stottlemire procured

16 CI's agreement to settle by misrepresenting Stottlemire's intentions. CI's opposition is again

17 diametrically opposite to the plain language of the Release the parties agreed to. CI drafted the

18 Release and specifically agreed to assume that risk. CI and Stottlemire "have expressly agreed to

19 assume the risk of such possible unknown damages, claims, demands, actions, or cause of action,

20 or such possible changes or differences in material fact." (Id. Pg 2-3). Even if CI agreed to the

21 terms of the Settlement under facts which later turned out to be other than or different from those

22 CI knew, suspected to know or believed to be true, the Release precludes rescission on these

23 grounds. None of the case law that CI relies upon in its 25-page Opposition included language like

24 that in the Release.

25 In conclusion, CI and Stottlemire agreed to a mutual general release in standard terms on

26 November 13, 2008. With its agreement to standard terms, CI carefully crafted the language of the

27 Release. Stottlemire never disagreed to those standard terms and only sought to add to them. On

28 November 13, 2008, CI and Stottlemire agreed to the Release. The minds had fully met. By CI's

1 own analysis the Release precludes rescission of the Settlement. CI cannot refuse to fulfill its

2 contractual obligations to Stottlemire by claiming it has rescinded an agreement which precludes

3 rescission. In an agreement which it drafted, CI foreclosed rescission. This Court should require

4 CI to sign and file the Stipulation to Dismiss with prejudice.

5   **3. Motion to Summarily Enforce is *not* Summary Judgment**

6   Stottlemire's Motion to Summarily Enforce the Settlement Agreement is not a motion for

7 summary judgment, since Stottlemire is not seeking judgment in his favor on any of CI's claims.

8 Pursuant to the Courts inherent authority and the authority conferred by California law, Stottlemire

9 moved the Court to Summarily Enforce Settlement Agreement. (*See Doi v. Halekulani Corp.*, 276

10 F.3d 1131 at 1135 (9th Cir. 2002) "Once a settlement has been reached in a pending action, any

11 party to the agreement may bring a motion to enforce it." *See also Cal. Civ. Proc. Code § 664.6*

12 "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of

13 the court or orally before the court, for settlement of the case, or part thereof, the court, upon

14 motion, may enter judgment pursuant to the terms of the settlement.") At no time does Stottlemire

15 seek relief pursuant to Federal Rules of Civil Procedure Rule 56 and it is unclear why CI devotes

16 so much of its Opposition claiming that Rule 56 is controlling.

17   Federal Rules of Civil Procedure Rule 56(b) states that "[a defending] party against whom

18 relief is sought may move at any time, with or without supporting affidavits, for summary

19 judgment *on all or part of the claim*" (emphasis added). In this immediate action, CI's claims are

20 brought under 17 U.S.C. § 1201(a), 17 U.S.C. § 1201(b) and related state law claims.

21 Stottlemire's Motion does not move the Court for judgment on all or part of CI's claim.

22 Stottlemire's Motion moves the Court to enforce the Settlement the parties entered into on

23 November 13, 2008. Therefore, CI's summary judgment argument is irrelevant.

24   **4. The Purported Breach**

25   Contrary to CI's claims, Stottlemire did not breach the Settlement by revealing confidential

26 information. Stottlemire disclosed only that which CI had disclosed to the Court and was readily

27 ascertainable by the public. CI also errs in attributing to Stottlemire, statements that obviously

28 were made by a third party and not Stottlemire, and also errs in misrepresenting an exchange

1 between a third party and Stottlemire. CI has no grounds to rescind the Settlement. This Court

2 should grant Stottlemire's Motion to Summarily Enforce the Settlement Agreement.

3 CI opposes by claiming "the natural *sin qua non* of any settlement agreement" is the

4 dismissal of the complaint. On November 14, 2008, CI filed a letter on the court docket which

5 stated that CI and Stottlemire had settled (Document 110). CI was under no requirement of law to

6 file this letter. By filing this letter, CI effectively admitted that it would dismiss the lawsuit against

7 Stottlemire, the natural *sin qua non* of any settlement agreement. Further, CI made no attempt to

8 conceal that it was dropping the lawsuit it had filed against Stottlemire from the public. The letter

9 was voluntarily filed by CI within 24 hours of the settlement between Stottlemire and CI and made

10 publicly available on the Court's docket. CI cannot now claim Stottlemire's mirroring of CI's

11 letter on his blog along with a statement which explained the natural *sin qua non* of any settlement

12 agreement is a material breach of the Settlement. Likewise, any additional postings or comments

13 made by Stottlemire limited to CI dismissing the lawsuit would not be a material breach of the

14 Settlement because these comments were not barred by the terms of the Settlement.

15 CI's only other articulated ground for rescission is Stottlemire's purported statement that

16 CI did not receive any remedy for its claims against Stottlemire, specifically that Stottlemire was

17 not required to stop publishing his "circumvention" instructions (Opposition 8:14-15). Stottlemire

18 has never made or inferred this statement to anyone. CI bases its opposition on two separate

19 postings. The first posting was authored by David Kravets, a Wired.com reporter. The second

20 posting was authored by Stottlemire; however CI misrepresented what was said.

21 David Kravets reported: "Terms of the settlement were not made public. They do not

22 require Stottlemire to remove the workaround, which is still published here" (Opposition 8:11-12).

23 This statement, which CI claims Stottlemire disclosed, is obviously an assumption by David

24 Kravets, based on publicly available – and therefore, <u>not</u> confidential -- information. The last

25 word in the statement, the word "here", is a hyperlink. If a computer user reading this statement

26 clicked on the word "here" it would load a webpage in their web browser. That webpage is not, as

27 reported, the "circumvention instructions" claimed by David Kravets. The page linked to by

28 David Kravets is instructions to completely remove CI's coupon printer software from a computer.

1   The uninstall instructions have never had an impact on the ability to print multiple coupons from

2   CI's website. The "circumvention instructions" CI has complained about since filing this action in

3   July 2007 do not exist on Stottlemire's blog, nor do they exist anywhere. Had CI made a

4   reasonable inquiry under the circumstances, CI would have known of David Kravets' mistake.

5   Finally, CI has once again misrepresented in its filings with this Court what Stottlemire

6   said. CI's opposition states: "Another user then asked whether Stottlemire would be allowed to

7   continue to blog about his circumvention methods, and Stottlemire said, "The blog will remain

8   intact and updated as needed" (Opposition 7:15-17). CI references Post #13 of Steven Boal's

9   Declaration Exhibit D. For the Court's convenience, a more legible copy of Post #13 has been

10   attached to this Reply (Stottlemire Declaration ¶ 2). As can clearly be seen, the user did not ask

11   Stottlemire about circumvention methods. The user's question is: "So, are you allowed to post

12   anymore blogs about how to remove this damn software from our machines without formatting the

13   entire PC?" Removal of CI's software is not a method of circumvention. CI is well aware of this

14   fact. CI is also aware that Stottlemire quit posting any instructions when CI began reading pseudo-

15   anonymous information from consumer's computers in order to limit distribution of its coupons.

16   Other than to advance its argument against Stottlemire, it is unclear why CI would misrepresent

17   these statements in its opposition. The user clearly enquired as to the status of Stottlemire's blog

18   page which provides detailed instructions on how to completely remove CI's software. Yet, CI

19   claims the user enquired about circumvention methods.

20   Once again, CI has attached no evidence to its pleading to support a claim of material

21   breach. CI cannot claim a breach to the Settlement without proper grounds. CI must fulfill its

22   contractual obligations to Stottlemire. This Court should require CI to sign and file the Stipulation

23   to Dismiss with Prejudice.

24   **5. CI's Opposition is Based Upon Hypothetical Conjecture**

25   To divert the Court's attention from the issues, CI repeats previous claims that by

26   Stottlemire's silence he is in effect admitting to CI's allegations. Apparently, CI hasn't been

27   listening. In virtually every communication with CI and this Court since CI first claimed

28   Stottlemire breached, Stottlemire has denied that a breach occurred. In addition, to deny each of

1 CI's purported grounds for rescinding the Settlement would have been impossible because

2 Stottlemire cannot predict, and then deny, CI's latest grounds before CI had articulated them.

3   CI's bases for rescission are like the shifting sands. Since November 21, 2008, CI has

4 recast its purported grounds authorizing rescission not less than three times. On November 21,

5 2008, CI claimed Stottlemire breached the agreement by disclosing the dismissal with prejudice

6 and that he "kicked ass" (Motion Exhibit G). On January 6, 2009, CI claimed Stottlemire

7 breached the agreement by disclosing "a dismissal with prejudice in return for no money"

8 (Coupons' Opposition to Defendant's Motion to Stay Discover (Document 129) 1:8-9). Finally, in

9 its Opposition to this Motion CI claims Stottlemire breached the agreement by disclosing a

10 dismissal with prejudice and that he was not required to stop publishing his circumvention

11 instructions (Opposition 8-13:15). Stottlemire could not predict the new bases that CI would offer

12 to support its arguments. It would have been impossible to deny any of CI's purported grounds

13 prior to CI articulating them.

14   To be certain, there has been no requirement to admit or deny any of CI's purported

15 grounds even had Stottlemire been able to do so. To discolor the then pending motions with an

16 apparent excess of adversarial animation would have been a waste of time for both Stottlemire and

17 the Court. As previously argued, the time to address CI's allegations was not ripe. Stottlemire

18 responded to each motion without deviating from the issues raised.

19   CI also opposes by claiming it knows exactly what Stottlemire was thinking and his

20 intentions after CI read Stottlemire's Motion. As an example, CI claims Stottlemire admits he

21 never intended to keep his promise of confidentiality. CI bases this claim on Stottlemire's

22 purported admission that he went into the ENE session with the mindset that the case would not

23 settle if Stottlemire was required to make any promises to CI. CI's analysis is in error and CI

24 purposely mischaracterizes Stottlemire's Motion. Prior to Settlement, CI repeatedly demanded

25 Stottlemire agree to an injunction, a promise not to circumvent CI's technology in the future. With

26 this Settlement, CI dropped that demand and the parties settled. Obviously, there are other

27 promises Stottlemire made which make clear CI's mischaracterization of Stottlemire's Motion.

28 Stottlemire promised to stipulate to the dismissal. Stottlemire promised to bear his own costs.

1   Stottlemire promised to release CI from any and all claims related to this action. And Stottlemire

2   promised to keep confidential the terms of the agreement. CI's 25-page filing lacks any evidence

3   that Stottlemire did not intend to keep these promises. Indeed, in filing this motion to summarily

4   enforce the settlement agreement, Stottlemire is demonstrating his intent to keep his promises.

5   Equally disturbing is CI's conclusion that Stottlemire would not have settled if the parties

6   did not agree to the confidentiality term. CI bases its conclusion on its speculation that Stottlemire

7   had to protect a reputation he had established with hackers and interested media (Opposition 4-

8   16:26). CI errs. If Stottlemire's goal was to protect a reputation he had established with hackers

9   and interested media, a term of confidentiality would defeat that purpose. Stottlemire's motivation

10   to settle this dispute came because of his then pending relocation to North Carolina and the

11   resources it would require should Stottlemire continue litigation in the state of California while

12   living in North Carolina. Stottlemire foresaw correctly that the cost, both financially and

13   personally would be great. Just one example was Stottlemire's requirement to leave his wife and

14   four day old daughter just two days after they were released from the hospital so that Stottlemire

15   could attend the hearing held on Stottlemire's Motion to Stay Discovery. Due to costs, Stottlemire

16   would have settled this dispute with or without a term of confidentiality. Confidentiality was not

17   material to Stottlemire.

18   CI submitted a 25-page opposition, littered with speculation and various defeats that

19   distract from the real issue: was there a meeting of the minds such that a contract was formed?

20   The answer to that question – and the only relevant question – is "Yes". Therefore, a settlement

21   agreement is in place, which the Court should enforce.

22   **6. The Settlement was *not* Procured by Fraud or Mistake**

23   CI disregards Stottlemire's surrounding conduct which unmistakably proves there has been

24   no intent to fraud. Further, CI errs in concluding Stottlemire had reason to believe CI disclosed

25   terms of the Settlement by mistake. CI's conclusion, that rescission is warranted based upon fraud

26   or mistake, is in error. CI has no grounds to rescind the Settlement and this Court should enforce

27   the Settlement.

28

1   CI's Opposition correctly establishes that "fraud may be established by the circumstances

2 surrounding the transaction" (Opposition 13:18-19). Yet, CI fails to consider *all* of the

3 surrounding circumstances to establish fraudulent intent. CI is fully aware but precludes those

4 circumstances which eliminate fraudulent intent. First, Stottlemire made clear, and Wired.com

5 published, that the Court did not vindicate Stottlemire. With this comment, Stottlemire

6 emphasized he did not win the lawsuit. (Motion 5:7). Second, Stottlemire made clear, and

7 Wired.com published, that CI upgraded their software in December 2007 and the instructions

8 central to the litigation were moot. (Motion 5:7-9). Third, Stottlemire made clear to CI he had no

9 desire to disclose material terms of the Settlement (Motion to Stay Discovery, Exhibit F).

10 Stottlemire stated:

11   "I am trying to avoid [a Motion to Summarily Enforce Settlement Agreement] to
        PROTECT CI from publically disclosing terms of the settlement. I can only
12   imagine what the press will say should it discover that to settle this action all
        Stottlemire had to do was AGREE not to file action against CI for Malicious
13   Prosecution and that CI did not even attempt to recover any of its legal fees"
        (emphasis in original).
14
In response, CI stated it "is fine with making everything public regarding the settlement" (Motion
15
to Stay Discovery, Exhibit F).
16
       Lastly, and most disturbing, is CI's mischaracterization of Stottlemire's statement he
17
released to Wired.com. In his Motion to Stay Discovery, Stottlemire fully explained his statement:
18
"in [his] opinion, kicked [the attorneys] ass" (Motion to Stay Discovery 8:9). Without any factual
19
underpinning, CI changed Stottlemire's statement to suit its desired purpose, an assertion of fraud.
20
CI states Stottlemire said: "that he "kicked their [Coupons'] ass" (Opposition 7:23-24). However,
21
CI is also aware that Stottlemire discussed this statement in a "chat" (Opposition 9:6-7). During
22
the entire course of litigation, the first time a third party claims to have spoken with Stottlemire in
23
a chatroom, CI adds it to its brief.   It is more than obvious that CI discovered that Stottlemire was
24
discussing the Wired.com blog entry through chat. The only way CI would have learned of
25
Stottlemire's chat was through comments made by third parties at Digg.com. A hyperlink to the
26
Digg.com comments is prominently displayed at the bottom of the Wired.com web page. In the
27
first comment in the Digg.com posting made by third parties proclaiming to have chatted with
28

Stottlemire is a transcript of that chat. The transcript is dated November 22, 2008 and includes the following statement made by Stottlemire: "the jury is still out if I actually kicked their ass (since no one knows the terms of the settlement) but, I fought for 16 months against large lawfirms and survived… so I kicked the attorney's ass" (ellipses and parentheses in original) (Stottlemire Declaration ¶ 3).

To assert fraud, CI must evaluate all of Stottlemire's surrounding conduct. Not simply those it cherry picks. Stottlemire's chatroom conversation makes clear Stottlemire did not execute the "victory dance" against CI as CI claims. CI employed two separate law firms to bring this action against Stottlemire. All of CI's attorneys have been well educated and have vast experience. Although neither party can claim an outright victory, a *pro se* litigant with no litigation experience and no formal education, who has prevailed each attempt of CI's attorneys to bully him, can certainly claim he kicked their ass.

CI also errs in concluding "Stottlemire knew Coupons' consent was given by mistake" (Opposition 14:18 – 16:19). The purported mistakes are keeping confidential "with" in "dismiss with prejudice" and not including terms prohibiting disparagement. Assuming these were mistakes, Stottlemire did not induce these mistakes. Stottlemire had no reason to believe that experienced attorneys could make a mistake as trivial as the mistake CI claims it made. Absent Stottlemire's knowledge that CI made a mistake, CI cannot claim the mistake provides grounds for rescission of the Settlement. The Settlement is a valid contract and cannot be rescinded. Accordingly, this Court should enforce the Settlement.

During the course of litigation, CI often times has argued before the Court and to Stottlemire that Stottlemire does not understand the law. Stottlemire readily admits, as a *pro se* litigant many areas of the law are foreign to him and must rely on the experience and knowledge of other attorneys by reading and studying briefs filed by them in various state and federal courts. Stottlemire must also listen with great care to things said to him by CI's attorneys and does so patiently. Given the experience and education of CI's attorneys, there is never a reason to believe they made a mistake. The most recent example of Stottlemire's faith in CI's attorneys was his first reaction to CI's filing on the eve of the hearing for Stottlemire's Motion to Stay Discovery.

1 Stottlemire's first reaction was "how do I counter this?" It was not until much later that

2 Stottlemire became aware that CI's filing violated the Civil Local Rules of this Court since it had

3 not requested leave to file the pleading.

4   Here, less than 24 hours after the parties settled, CI's attorneys told the Court and public

5 that it was dropping its lawsuit against Stottlemire. Stottlemire had no reason to believe that CI's

6 attorneys made the information readily available to the public through mistake. Even though CI

7 immediately disclosed that term of the Settlement, Stottlemire patiently waited to see if CI planned

8 to file a redacted Stipulation to Dismiss with Prejudice. When it became clear CI had no intention

9 to file a redacted stipulation and that the stipulation would be readily ascertainable by the public,

10 Stottlemire posted CI's November 14, 2008 letter to the Court on his personal blog. Stottlemire

11 further stated that the lawsuit would be dismissed with prejudice.

12   Stottlemire waited seven days so that he could be certain of CI's interpretation of the

13 Settlement. Stottlemire had no reason to question if CI's experienced attorneys were making a

14 mistake. Stottlemire is a *pro se* litigant without the aid of experience or education. If CI's

15 attorneys interpreted the terms of the Settlement and decided it could disclose the lawsuit would be

16 dismissed with prejudice, Stottlemire had no basis to question them.

17   CI cannot claim to have rescinded the Settlement based upon fraud or mistake. Fraudulent

18 intent must be established by all of the circumstances surrounding the transaction. Not just CI's

19 cherry picked incidents. Mistake need not be mutual, but rescission for unilateral mistake requires

20 Stottlemire must have believed CI made a mistake and then did nothing to correct it. The

21 Settlement is an enforceable agreement entered into by CI and Stottlemire on November 13, 2008

22 and this Court should enforce it.

23 **IV.**   **CONCLUSION**

24   CI and Stottlemire entered into a fully enforceable settlement agreement on November 13,

25 2008. Less than 24 hours later, CI disclosed to the public that it was dropping its lawsuit against

26 Stottlemire. The confidentiality term of the Settlement Agreement obviously did not apply to this

27 term of the agreement. Shortly after Stottlemire echoed CI's disclosure on his own blog, CI

28 informed Stottlemire that it had rescinded the Settlement Agreement and refused to file the

1 Stipulation to Dismiss with the Court unless Stottlemire agree to new terms to settle the litigation.

2 When Stottlemire refused, CI began an avalanche of discovery requests and willfully violated the

3 Federal Rules of Civil Procedure and Civil Local Rules of this Court. CI's purpose of the

4 avalanche is clear; overwhelm Stottlemire in an attempt to coerce him into accepting the newly

5 offered terms in a manner calculated to delay the case and increase the costs incurred by

6 Stottlemire. Stottlemire and CI have already agreed to settlement terms. Their signature on the

7 Settlement Agreement is evidence of this.

8   One of the terms of the settlement agreement required CI and Stottlemire to exchange

9 mutual general releases in standard form. CI then authored the Mutual Release as it understood

10 the term "standard form" when it signed the Settlement Agreement on November 13, 2008. The

11 minds had fully met on November 13, 2008. The mutual release agreed to by CI and Stottlemire

12 preclude rescission of the agreement no matter what happens in the future. CI made this clear in

13 its email to Stottlemire. CI cannot claim that "no matter what happens in the future" only applies

14 when it fits squarely into CI's purpose. It equally applies to Stottlemire.

15   Stottlemire therefore respectfully requests that the Court summarily enforce the settlement

16 agreement. CI must fulfill its contractual obligations to Stottlemire by signing the Release and

17 delivering a signed stipulation of dismissal with prejudice to the Court.

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John A. Stottlemire
4509 Wayland Court
High Point, NC 27265
Telephone: (614) 358-4185
Email: johna@stottlemire.com
Defendant, *pro se*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

COUPONS, INC., a California corporation,   )   Case No. 5:07-CV-03457 HRL
)
                    Plaintiff,   )   **DECLARATION OF JOHN**
)   **STOTTLEMIRE IN SUPPORT OF**
              v.   )   **DEFENDANT'S REPLY TO**
)   **PLAINTIFF'S OPPOSITION TO**
JOHN STOTTLEMIRE   )   **DEFENDANT'S MOTION TO**
)   **SUMMARILY ENFORCE SETTLEMENT**
                    Defendant   )   **AGREEMENT**
)
)   Date: February 24, 2009
)   Time: 10:00 AM
)   Courtroom: 2, 5th Floor
)   Judge: Hon. Howard R. Lloyd

        I, John Stottlemire, hereby declare:

        1.   I am the Defendant in this action. I state all facts herein of my own firsthand

knowledge, and if called as a witness, I could and would competently testify thereto.

        2.   On February 8, 2009, I visited the website address which isolated Exhibit D Post 13

to the Declaration of Steven Boal in Opposition to Defendant's Motion to Summarily Enforce

Settlement Agreement. I was able to isolate Post 13 by clicking on the number 13 in the upper

right hand corner of that post. A true and exact copy of Post 13 is attached to this Declaration as

Exhibit A.

        3.   On February 10, 2009, I visited the website address an ordinary internet user would

visit by clicking on the "digg it" hyperlink located at the bottom of Exhibit E to the Declaration of

Steven Boal in Opposition to Defendant's Motion to Summarily Enforce Settlement Agreement.

Clicking on that hyperlink caused a page to be loaded in my web browser entitled "Coupon Hacker

1 Defeats DMCA Suit". A true and exact copy of that webpage is attached to this Declaration as

2 Exhibit B.

3 I declare under penalty of perjury under the laws of the United States of America that the

4 foregoing is true and correct. Executed this 10th day of February 2009 at High Point, North

5 Carolina.

6

7

8 Dated: February 10, 2009

9

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Dated: February 10, 2009

_____/s/_____
John Stottlemire
Defendant, *pro se*

EXHIBIT A

View Single Post   **Thread**: **Coupons, Inc. v. Stottlemire**

11-20-2008, 01:58 PM   #**13**

virtually_john

L1: Learner

Date Joined: Sep 2007

Location: High Point, NC

Posts: 17

Reputation: 17 ▇

Quote from MarkBett 🔗 :

looks like op created multiple accounts to try to get coupons for free stuff and other coupons and violated the dmca and also "sold" coupons as well as circumvented the software to allow multiple copies of copons

Actually, the case has nothing to do with creating multiple accounts. The fact that I offered coupons in exchange for a handling fee had no bearing other than to allege I was in competition with Coupons, Inc. Circumventing to allow multiple copies and violating the DMCA are the exact same thing, neither of which have been proved. Only alleged.

Quote from playa07 🔗 :

😀 😀 😀 😀 😀 Right On!!!

So, are you allowed to post anymore blogs about how to remove this damn software from our machines without formatting the entire PC?

The blog will remain intact and updated as needed.

Quote from Pig 🔗 :

So...you were exploiting their coupon policy?

Coupons, Inc. has no "coupon policy" on their website. The Licensing Agreement now in their software installation was nonexistant in May 2007 and only first appeared after I filed a motion to dismiss because there were no terms and conditions to prevent removal of files and registry keys on my computer. A motion I ultimately won because of the lack of the Licensing Agreement.

-john

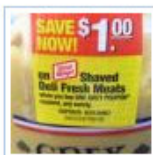| Mod Alert | Edit | Reply |

Close this window

EXHIBIT B

709
diggs

dugg!

Coupon Hacker Defeats DMCA Suit

blog.wired.com — A California online coupon generating company is dropping its Digital Millennium Copyright Act lawsuit against a man sued for posting commands allowing users to print an unlimited number of valid coupons.

↪ Share ⭐ Favorite? made popular **80 days ago**

submitted by
DigSomeMore
81 days ago
⊕ FRIEND

People Who Dugg This Also Dugg BETA

531
Cell jammers still illegal, but may come to state prisons
Made popular 76 days ago 🗨 96 arstechnica.com

726
GOP governor slams party
Made popular 80 days ago 🗨 115 www.politico.com

486
Ultra-wideband radio rides a beam of light
Made popular 81 days ago 🗨 34 www.physorg.com

How are these stories? **Let us know!**

| 53 Comments | Who Dugg It? |

expand all | only mine (1) | only friends' | oldest first ⌄   hide profanity   settings

Louis11
on 11/21/2008

"Without being represented by an attorney, I defended myself in federal court against a company who solicited the services of two separate law firms," Stottlemire said. "And in my opinion, I kicked their ass."

▶ 1 Reply — best has 3 diggs

+102 diggs 🔴 ⬜

Reply

aolshove
on 11/21/2008

Well, maybe it's because all coupons contain the phrase, "This coupon has no monetary value". It's hard to prosecute somebody for stealing something that you, yourself admits has no value.
Or, maybe they just realized that the more people that redeem the coupons are BUYING MORE OF YOUR PRODUCT.

▶ 2 Replies — best has 7 diggs

+57 diggs 🔴 🟢

Reply

Top in Security

646
Hackers Using Fake Parking Tickets to Infect Computers

Maximize

therealBEANS
on 11/21/2008

If you go to his blog you can chat with him. He seems like a down to Earth guy and not in it for the money, looking out for the consumers and mentions he wants the world to know a normal people like us can go up against huge corporations and win.

http://www.tenbucks.net/
▶ 3 Replies — best has 3 diggs

+23 diggs

Reply

Gonasadude
on 11/22/2008

Conversation I had with him detailing how he did it:

Visitor
Man, congrats on wooping their asses.

John Stottlemire
Thank you

Visitor
I'm sure that you're aware that an article about you is on digg.com.

John Stottlemire
Yes, its all over the internet actually.
I'll be famous. ha ha ha. not quite what I wanted to be famous for "a coupon hacker" lol

Visitor
The script thing kind of sounds like things that I did while in school for various websites.

John Stottlemire
it wasn't even a script. it was a batch file that used "erase" and "reg delete" commands

Visitor
Did it just delete the cookies or something? The article I read was pretty vague.

John Stottlemire
deleted 5 registry keys and two hidden files in the windows directory

Visitor
=) Nice.

John Stottlemire
the registry keys and files were very deceptively named

Visitor
Oh I bet.

John Stottlemire
like "autotrayhistoryenable"

+25 diggs

Visitor
Haha, wow

John Stottlemire
and windows.shell.manifest.old

Visitor
How did you find it? did you do a diff of your registry after getting a coupon?

John Stottlemire
used regmon to see where it was writing in the registry and filemon to see what files it accessed
just in case it was appending data

Visitor
Ah, cool

John Stottlemire
nothing too hard, but I got sued for it. lol

Visitor
Yea, but you kicked their ass, and they wasted lots of money on lawyers.

John Stottlemire
the jury is still out if I actually kicked their ass (since no one knows the terms of the settlement)
but, I fought for 16 months against large lawfirms and survived... so I kicked the attorney's asses

Visitor
Props to you man. I'm out though. Thanks =)

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John Stottlemire
the jury is still out if I actually kicked their ass (since no one knows the terms of the settlement)
but, I fought for 16 months against large lawfirms and survived... so I kicked the attorney's asses

Visitor
Props to you man. I'm out though. Thanks =)

▶ 9 Replies — best has 48 diggs   Reply

kangy3213
on 11/22/2008

I like turtles   -6 diggs

▶ 2 Replies — best has 3 diggs   Reply

jeffkee
on 11/22/2008

I'm hungry.   +2 diggs

                                                                   Reply

john214
on 11/22/2008

Those damn toothpaste thiefs!   -1 diggs

                                                                   Reply

maleficdog
on 11/22/2008

He defeated the attorneys, and we destroyed his website.   +16 diggs

Karma.

                                                                   Reply

infinitejones
on 11/22/2008

Is it just me or is the site down at the moment? All I get is a blank page - not even a server or dns   0 diggs
error. Going through translate.google.com seems to work fine but I don't know whether that's a
translation of the live site or a Google snapshot...

                                                                   Reply

punkcat
on 11/22/2008

Fucking pirates getting 50 cents off butterball turkeys. FU.   +20 diggs

                                                                   Reply

oMeSSiaHo
on 11/22/2008

If the services can be exploited companies will be hesitant to post coupons online. Whats to stop   +2 diggs
a few greedy people from ruining it for everyone?

▶ 3 Replies — best has 5 diggs   Reply

bobbknight
on 11/22/2008

No defeat, just a pull out.   +1 digg

▶ 1 Reply — best has 1 digg   Reply

Khast
on 11/22/2008

Wait, so now you can be sued for removing data off my own computer? I delete registry keys all   +10 diggs
the time, not for hacking purposes, but to keep it streamlined and free from orphans.

But, I guess I had better watch out, that 47KB I shaved out of my registry last time I did maintenance might land me
in court. :O Oh noez!!!

                                                                   Reply

jflaker
on 11/22/2008

THEY place data on the end user computer to prevent multiple coupons   +11 diggs
USER removes data, which they have EVERY right to do
THEY sue user for removing data because it broke their program

NEVER EVER EVER EVER EVER rely on data on an end user system for your system to work right.....Bad
programming will always nip you in the ass sooner or later.

                                                                   Reply

PurgueFlantar
on 11/22/2008

John Stottlemeir, the "hacker" has a chat app embedded on his website, this is the transcript of   +1 digg
my bried conversation with him:

Visitor
Heya John, just read the Digg article about you, great stuff.

John Stottlemire
Thank You!

Visitor
Did you see the Digg posting? Do you follow that site?
http://digg.com/security/Coupon_Hacker_Defeats_DMC ...

John Stottlemire
yeah, pretty cool
and its generating tons of traffic
I like this one too:
http://arstechnica.com/news.ars/post/20081121-coup ...

Visitor
Cool beans John, hang tough.

John Stottlemire
thanks! I appreciate it!

Reply

---

johnstottlemire
on 11/22/2008

Ya'll quit posting my chats. LOL.

+4 diggs

Reply

---

opticwind
on 11/22/2008

I don't know why we are supporting him. Even if it brought business to the company that's not his decision to make. I mean...just because he is a hacker, it doesn't mean he's doing something good.

+1 digg

▶ 1 Reply — best has 2 diggs   Reply

AyaJulia
on 11/22/2008

Lulz, that's my father. -.-

+3 diggs

...no, seriously. Might be nice if I saw a penny of that money for all the time my mom had to work multiple jobs while he didn't pay child support. Fucking deadbeat. I could use it, immigration and education are expensive. But whatever, grats and shit or something.

▶ 2 Replies — best has 1 digg   Reply

---

johnnyCA
on 11/25/2008

Summary: Coupons Inc. gets coupwned

0 diggs

Reply

---

coupon888
on 01/21/2009

Thanks for your sharing and I would like to share with you the latest coupon codes from
http://www.couponsmarter.com.

try it out and you will find you could save a big dollar with couponsmarter.com

Reply

Zengetsu
on 01/28/2009

http://animecorruption.com/

+1 digg

Reply

Add a Comment — No HTML please. Comments are editable for 5 min.

Enter the text you see in the image.

5G3an

🕐 Please allow up to 60 sec for your comment to be saved.

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